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In the Supreme Court of the United States

OCTOBER TERM, 1980

ROLLA L. SKIDMORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks relief from a conviction based on a guilty plea on the ground that the judge who accepted the plea did not ask petitioner if it resulted from discussions with government attorneys.

1. When petitioner learned he was under investigation by the Internal Revenue Service for failing to file income tax returns for 22 years, he initiated contact with the Office of the United States Attorney for the Northern District of West Virginia (A. 93).[1] After petitioner's case was officially assigned to that office, Assistant United States Attorney Wilmoth con-

[1] "A." refers to the appendix filed in the court of appeals.

tacted petitioner and then met with him on January 10, 1979 (A. 38, 93-94). Wilmoth proposed dropping four of the anticipated five counts of willful failure to file if petitioner would plead guilty to one count (A. 79, 102). Part of the proposal was that the government would make no recommendation as to sentence (A. 102).

On January 19, 1979, a five-count information was filed against petitioner (A. 3-6). Each count charged a willful and knowing failure to file an income tax return in violation of 26 U.S.C. 7203. Petitioner appeared before the district court that day and said that he wished to plead guilty and to proceed without the assistance of counsel (A. 29, 31). The court ascertained through detailed questioning that petitioner was 59 years old, a high school graduate, and a career State Farm insurance agent (A. 26-27, 52). The court also determined that petitioner was in good physical and mental health and was not using any alcohol or medication that might impair his ability to understand the proceedings (A. 27).

The court told petitioner of the charges (A. 28-29) and emphasized the possible penalty (A. 28):

> THE COURT: I would bring to your attention, because it nowhere appears on the information, are you also aware that each one of those charges carries with it a possible maximum penalty of either one year imprisonment or a ten thousand dollar fine or both?
>
> [PETITIONER]: Yes, I am. I think I was aware of that.
>
> THE COURT: In other words, do you understand, if the Court felt it was appropriate, that you could be sentenced to periods of time in a prison of up to five years and could be fined up to fifty thousand dollars, or anything less in re-

gard to either one, whatever I consider to be appropriate under the circumstances.

[PETITIONER]: I understand, your Honor.

When petitioner again said he intended to proceed without counsel, the court suggested to him the advantages of retaining an attorney (A. 29-31, 32-33). The court also told petitioner of his right to plead not guilty and stand trial and recited the consequences of a plea of guilty and the rights petitioner would waive by pleading guilty (A. 31-33). This exchange then occurred (A. 33-34):

THE COURT: Has anyone made any predictions to you as to how these charges will be handled before this Court?

[PETITIONER]: No sir. Other than what you said there awhile ago, that I plead guilty to one. That's the only thing that's been—I've been assured that they could not tell me what you were going to do.

THE COURT: Because they cannot.

[PETITIONER]: That's the way I like it.

THE COURT: I would have and I will have in this case a pre-sentence investigation report made. And I will take that into consideration before I make disposition in the case. That will be one of the several things that I will consider. You will certainly be given a copy of that and given the opportunity to question the matters contained in that pre-sentence investigation report. But I want to make it clear to you that by no means could anyone at this time predict what I might do.

[PETITIONER]: No, sir, I'm sure of that. They have definitely warned me of that.

The court then set the date for accepting any plea from petitioner several weeks off, to give petitioner

a further opportunity to reflect on his plea and on his decision not to obtain an attorney (A. 34-35). The judge asked petitioner if he could afford an attorney; petitioner insisted that he could (A. 35-36). The judge then asked if petitioner had "any questions in regard to what a lawyer could or could not do for you that I might be able to answer" (A. 36). Petitioner said: "I have no questions. I have a statement. I don't see where a lawyer can help me anyway in the world. I made the mistake some time ago. * * * I let it go until they actually caught up with me. I don't see—I've done it. I have no—" (A. 36). The judge then said that he "strongly recommend[ed]" that defendants in his court be represented by counsel; he reiterated the advantages of obtaining an attorney (A. 37).

On February 12, 1979, petitioner appeared in the district court to enter his plea. The court noted that it had received a written statement from petitioner of his continued wish to make the plea and to proceed without counsel, and petitioner said that this was still his intention (A. 40). The court then inquired into the plea agreement (A. 41-42):

> THE COURT: As you are aware, sir, the United States Attorney has filed an information against you charging several counts in relation to violation of the income tax statutes. And you have agreed previously, apparently, to plead to one of those counts. Is that correct?
>
> [PETITIONER]. That is correct, sir.
>
> THE COURT: Now, Mr. Wilmoth, would you explain the circumstances of the oral plea agreement.
>
> MR. WILMOTH: Well, your Honor, [petitioner and his wife] came to my office on Janu-

> ary 10, and then [petitioner] and I talked on the telephone on January 15th.
>
> We agreed that in return for [petitioner's] plea of guilty to count five of the information that the Government would at the time of sentencing move to dismiss the remaining counts and would make no recommendation to the Court as to sentence.
>
> THE COURT: Is that the entire plea agreement as you understand it?
>
> [PETITIONER]: Yes, sir, that is, as I understand it; yes, sir.
>
> THE COURT: Are you satisfied with that plea agreement so far as you are concerned?
>
> [PETITIONER]: Yes, I am satisfied with the plea agreement. However, I would like to make a statement, if I may.

Petitioner then made another statement admitting his guilt, which the court did not accept as a guilty plea (A. 42-43). The court warned petitioner that he was under oath and could be prosecuted for perjury if he made any false statements (A. 44). The court then explained the charge against petitioner in detail (A. 45-46). The court specifically determined that petitioner understood that he could not have committed the crime charged if he had acted "by accident or mistake * * * it took a specific intent on your part to fail to file these income tax returns, in violation of law, knowing that you had a legal duty to file such returns" (A. 46). The court then enumerated, again, the rights petitioner waived by pleading guilty (A. 46-49). The court told petitioner that he was exposing himself to a penalty of "up to one year in prison or a ten thousand dollar fine or both" (A. 49); petitioner replied, "I understand that, sir. That was explained to me the last time." Petitioner said he

understood that the government had "made no arrangement or bargain with you in regard to the penalty" and that the sentence remained "solely in [the court's] discretion" (A. 49).

In response to questioning by the court, petitioner stated that no one had induced him to plead guilty against his will, that no one had pressured, intimidated or threatened him, that the plea was an act of his own free will, and that no one had made any predictions about how the court would dispose of his case (A. 49-50). The court heard testimony from an Internal Revenue Service Agent confirming petitioner's guilt (A. 50-53) and again "strongly advise[d]" petitioner to obtain counsel (A. 55-56). When petitioner again declined, the court ascertained that petitioner was "satisfied with the bargain that you made with the Government to plead guilty to one count" (A. 56) and, when petitioner repeated his desire to plead guilty, accepted the plea (A. 10-11, 56).

On March 22, 1979, petitioner was sentenced to one year's imprisonment and a fine of $10,000 (A. 12, 64-65). On April 26, 1979, petitioner, by then represented by counsel, moved to withdraw his guilty plea, alleging a number of defects in the plea-taking proceeding (A. 15-20). The district court, after holding a hearing, denied the motion in a written opinion (Pet. App. 12-19). Petitioner appealed from the denial, and the Fourth Circuit affirmed (*id.* at 1-11). It rejected petitioner's claims that the judge had not complied with Fed. R. Crim. P. 11 (*id.* at 5-7) and that petitioner should be allowed to withdraw his guilty plea because he relied on a government attorney's statement that in the attorney's experience the district judge had never imposed a prison term for an offense comparable to petitioner's (*id.* at 9-10). The court of appeals also "commend[ed] the

district judge * * * for the conscientious discharge of his responsibility in the acceptance of [petitioner's] waiver" (Pet. App. 4-5).

2. Petitioner's sole contention in this Court is that the district court violated Rule 11(d) by not asking whether petitioner's guilty plea was the product of "discussions" with government attorneys. This contention is wholly without merit.[2] On several occasions, the district judge asked petitioner about the plea agreement, ascertaining that petitioner understood it and considered it satisfactory. The district court also asked the Assistant United States Attorney to "explain the circumstances of the agreement" (A. 41-42) and learned of that attorney's conversations with petitioner. Petitioner stated that the government attorney had described the entire plea agreement and that petitioner was satisfied with it. The district judge also repeatedly asked petitioner if government attorneys had promised that petitioner would receive a certain sentence. At one point, in response to the judge's question, petitioner stated that government attorneys had not even predicted what sentence he might receive (A. 50). The district court asked petitioner if he was pleading guilty against his will or because of force, threats, or intimidation. It is difficult to imagine a more thorough inquiry into the discussions that led to the guilty plea.[3] In this re-

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[2] Because the district judge complied with Rule 11, this case does not present the question, adverted to in the petition (Pet. 19-22), of the extent to which strict compliance with the provisions of Rule 11 is required. See, *e.g.*, *United States* v. *Dayton*, 604 F.2d 931 (5th Cir. 1979) (en banc); Brief for the United States at 33-34 n.19, in *United States* v. *Timmreck*, 441 U.S. 780 (1979).

[3] Petitioner suggests that the judge's questioning failed to uncover two aspects of his discussions with government at-

spect, as in all others, the district judge complied fully with Rule 11.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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torneys—their "representations and misrepresentations * * * that [petitioner] would not go to jail" (Pet. 9) and their "misrepresent[ation] * * * that [petitioner]was making as good a deal as if he were represented by counsel" (Pet. 5). But the record demonstrates that the district judge repeatedly and specifically asked petitioner about any assurances the government had given him about his sentence; and the judge went to great lengths to ascertain that petitioner knew the advantages of retaining an attorney and that his decision to proceed without counsel was his own choice. In addition, the district judge found, in his order denying petitioner's motion to withdraw his guilty plea, that "the plea bargain which [petitioner] entered into was in accordance with the policy set by the Tax Division of the Department of Justice * * * and would have been the same even if defendant was represented by counsel" (Pet. App. 17-18). Thus government attorneys cannot be accused of having misled petitioner, and petitioner has failed to show that the alleged defect in the plea-taking proceeding prejudiced him.

Petitioner appears not to have appealed directly from the judgment entered on his guilty plea. Under *United States* v. *Timmreck, supra*, petitioner's failure to show prejudice would be fatal to any collateral attack on a conviction based on a guilty plea, even if Rule 11 had been violated. But the time for a defendant to file an appeal in a criminal case can be extended to 40 days (see Fed. R. App. P. 4(b)), and petitioner moved to withdraw his guilty plea within that period; thus petitioner's challenge to his conviction arguably may be treated as a direct appeal. This issue is immaterial to this case, in any event, because the district judge complied with Rule 11.

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